IN THE

Supreme Court of the United States

OCTOBER TERM 1902

No. 123

THE NORTH AMERICAN TRANSPORTATION AND TRADING COMPANY, as claimant of the Steamship "Roanoke," APPELLANT,

vs.

T. J. KING and A. WINGE, copartners as KING & WINGE, and W. B. FRASER.

BRIEF OF APPELLANT

STATEMENT.

While a certificate seems not to be necessary in appeal on a constitutional question, one has been furnished by the lower court, and, as it states the case concisely, we can probably do no better now than to set it out in full.

"King and Winge, libelants, alleged that between December 5th and 22nd in the port of Seattle, Washington, they had furnished spars and timber of the reasonable value of ninety dollars, and performed labor of the rea-

sonable value of two hundred and thirty-three dollars, for the repair of the steamship Roanoke, at the request of its owner's contractors, who 'had full charge of the alteration and repair of the said steamship.' This they alleged was done on the credit of the Roanoke, which was an American vessel.

"The intervening libelant, W. H. Fraser, made the same allegations and claimed the sum of one hundred and fifty dollars and twenty-five cents.

"The North American Transportation & Trading Co. appeared as claimant and owner and the vessel was released upon its stipulation.

"It admitted all the allegations of the libel except that the work was done on the credit of the ship, which it denied except that it admitted that libelants had acted under the belief that they had a lien by virtue of law. It then alleged its incorporation and existence under the laws of the State of Illinois, the residence there at all times of its president and general manager, its maintaining only agencies at Seattle and at other places in Alaska and Canada, and its enjoying a high credit. The Roanoke it alleged to be an ocean-going vessel registered at Chicago, Illinois, under the navigation laws of the United States, with the name of Chicago painted on her stern. She was alleged to have been purchased by claimant in 1898 on the Atlantic coast, and employed upon the Pacific coast since that time between Seattle and the mouth of the Yukon in the Summer, and between San Francisco and Southern ports in the Winter. It was further alleged that the claimant had never given any order for the material and labor described in the libel, and that these were furnished on the order of the contractor, who, before the filing of the libel and without any knowledge by claimant of these un-

paid claims, had been paid by this claimant for these materials and labor in full. It was alleged in conclusion that the lien claimed by libelants was claimed under sections 5953 and 5954 of Ballinger's Code and Statutes of Washington, that such a lien was in this instance void, being in violation of the 8th section of the First article of the Constitution of the United States conferring upon Congress the power to regulate commerce among the several states, was an illegal burden upon interstate commerce, and in violation also of the 14th article of the Constitution of the United States as depriving claimant of its property without due process of law and without its equal protection, and was in violation of the second section of the third article of the Constitution conferring on the courts of the United States admiralty and maritime jurisdiction.

"To the intervening libel of Fraser the same answer was made.

"To each of these answers respectively the libelants and intervening libelant excepted as insufficient, and the whole of each, to constitute any answer or defense to the libel.

"The exceptions were sustained, the claimant elected to stand on its answer and a decree was entered against it and its stipulators for the whole sum claimed in the libel.

"Now, therefore, I do certify to the Supreme Court the following questions: Were the alleged liens void and should the exceptions to the answers have been overruled, that is to say:

"(*a*) Are sections 5953 and 5954 of Ballinger's Codes and Statutes of the State of Washington, as to ships owned and registered in other states, in conflict with the 8th section of the first article of the Constitution of the United States?

"(*b*) Are they in violation of its 14th article as depriving the owner of his property without due process of law in so far as they attempt to compel the owners after payment to the contractor to pay the libelants also?

"(*c*) Are they in conflict with the second section of the third article of the Constitution of the United States conferring on the United States courts jurisdiction in admiralty?"

SPECIFICATION OF ERROR.

The court erred in sustaining the exceptions of libelants to the answer of claimant, for the reason that the statute of Washington, on which libellants claim a lien is, as applied to the "Roanoke," in violation of the Constitution of the United States, to wit, the 8th section of its first article and the 2d section of its third article.

ARGUMENT.

This case is brought here by a non-resident ship and its non-resident owner to resist a lien statute of the State of Washington. That statute is as follows (2 Ballinger's Code, secs. 5953-4):

"5953. All steamers, vessels, and boats, their tackle, apparel and furniture, are liable—

* * * * * * *

"3. For work done or material furnished in this state, for their construction, repair, or equipment, at the request of their respectve owners, masters, agents, consignees, contractors, sub-contractors, or other person or persons

having charge in whole or in part of their construction, alteration, repair, or equipment; and every contractor, sub-contractor, builder, or person having charge, either in whole or in part, of the construction, alteration, repair, or equipment of any vessel shall be held to be the agent of the owner, for the purposes of this chapter;

"Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued."

"5954. Such liens may be enforced in all cases of maritime contracts or service by a suit in admiralty, *in rem*, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime by a civil action in any district court in this territory."

The statute is not particularly referred to in the libel, but the pleader makes his reliance on it clear by setting up the request of a contractor and using the statutory phrase as to the relation between the owner and the contractor, the latter "having full charge of the alteration and repair" (p. 2 V.), besides which, our allegation in answer that the statute is the basis of their claim (p. 13, IV) is admitted by their exceptions. It is apparent that the statute was relied upon, as no lien for a contractor's debts would be allowed a sub-contractor by the law maritime. It was on the request, not of the ship's master or other officer that the services were rendered and the material furnished, but on the request as libellants themselves allege, of contractors in charge of repairs. Thus the master, whose implied authority to bind the ship might have been the basis of a maritime lien, had nothing to do

with the matter. Did the owner, then? Only as the contractors may have been his agents by pure force of the statute for the time being. But if it were the owner in person, so much the worse. This would actually prevent a lien under the law maritime, for it is a familiar principle that what is done at the request of an owner is presumed to have been done merely on his personal credit whether at his home or in a foreign port (*The Jennie Middleton*, 94 Fed., 683; *The Havana*, 92 Fed., 1007), especially if it be admitted, as here, that his personal credit was high. Neither facts nor phraseology being employed such as would aim at a lien under the general maritime law, the libel must rest, and was manifestly intended to rest, upon the statute.

That the Roanoke was a non-resident ship must, of course, be conceded to us. Registered in a port, and belonging to a citizen, of Illinois, she was property only of the State of Illinois. (*Hays vs. Pacific M. S. Co.*, 17 How., 596; *Morgan vs. Parham*, 16 Wall., 471.) However much she might loiter in other waters, she was not liable even to taxation outside of Illinois, for she had no other *situs*. (Cases *supra* and *Pullman Co. v. Pennsylvania*, 141 U. S. at 32.)

THE JURISDICTION OF THIS COURT.

The amount involved is sufficient. (*The Paquette Habana*, 175 U. S. 677.) That the constitutional question was raised by the defense and not by libelants is no objection. Direct appeal may be taken no matter which party raised such question in the lower court. (*Loeb vs. Trustees*, 179 U. S. 472; *Connelly vs. Union Sewer Pipe Co.*, 184 U. S. 540.)

We will now proceed to discuss the specifications of error.

FIRST QUESTION.

Does the Washington statute offend the commerce clause?

In no part of that subject of inter-state commerce which organic law has bestowed on our common government has the tenderness and jealousy of national policy been so great as in that of navigation. This is one province which, relinquished by the states, has been everywhere explored, occupied, and subjected by its new possessor. Nowhere is anything left uncertain. The regulations of government are wrought out in the finest detail. Nothing has been too small. The placing of buoys, the licensing of masters, engineers and pilots, and even the wages of seamen, have become the subject of statutes. The navigation laws of the United States are in themselves a volume.

Nor has this vigilance and care, this exclusiveness of possession, been confined to the legislature. The national courts have been equally zealous. From the time of *Gibbons v. Ogden,* which announced the federal authority over navigation, to *The Genessee Chief,* which extended the territorial operation of admiralty, down to the present day the decisions of this court and its satellite tribunals have unceasingly maintained and enlarged the original appropriations. The maritime laws of the national government cannot even be enforced by the states. No more can the uncodified jurisprudence of the seas, for courts of admiralty belong to the federal government alone. Whatever encroachments of state law may be tolerated in commerce on land, commerce on sea, it is held, is a subject even more exclusively within the national care.

"Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the federal constitution. * * * Again, the vehicles of commerce by water being instruments of inter-communication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water and especially by sea is at once clearly marked and distinctly discernible."

This language from *Railroad Co. v. Maryland,* 21 Wall. 456, 470, is quoted with approval even by that majority in this court who conceded to the states certain rights as to commerce by land. (*Pullman Co. v. Pennsylvania,* 141 U. S. at 32). Cars that were owned in one state might be taxed if moving in another, but the ships of another state never.

The very sale, hypothecation and transfer of ships is regulated by the navigation laws of the Union, and those laws have their origin in the interstate commerce provisions of the federal constitution. Why should one state be allowed, then, to fasten liens upon vessels of other states? Does this not directly invade the interstate commerce right of the general government?

Any other view seems full of danger. State liens might become unreasonable. But, grant that they remained reasonable, their very want of uniformity is vexatious to interstate commerce. To this it may be suggested that, if ship owners do not like the lien laws of other states, let them keep their ships out of them. But this will not do. The duty of the federal government to regulate, is

also its duty to protect, commerce, and to protect is to promote. It is the national policy under the constitution to make the ports of each state attractive to citizens of every other so far as can be done by wise and uniform laws, and if this last be thought a consideration for Congress rather than the courts, it is at least the duty of the latter, since they cannot enact national laws, to restrain the operation of unreasonable local laws.

Hard as it is to conceive that the federal government will ever permit the encroachment of State liens where both commerce and admiralty are concerned, it is altogether too hard to imagine that they will permit such liens to be unreasonable in themselves. In *The Belfast*, 7 Wall. 624, this court, in sustaining (as to home port only, of course) a local lien and allowing State laws to provide regulations for such liens, does not fail to qualify the privilege with the word "reasonable." We may therefore ask whether the present lien in reasonable.

The mere reading of this law shows that it is one of the most unreasonable ever enacted of its kind.

For three years this lien continues. No record, no notice, actual or constructive, is required. It is wholly secret. No conditions or limitations in favor of freeing the ship at some early day from the thing appear, such as when the ship is transferred to a new owner after a reasonable period, or after her departure from the State. It stiffly binds the owner, though he must, some time or other, make his payments to the contractor, and cannot be expected to wait three years. It hampers shipping because men will be discouraged if, after so long a time, bills of unknown supply men can be enforced. In three years' time a ship, it may well be apprehended, will have incurred no man can tell how many expenses. Take our

own instance. We have paid the contractor in full in perfect ignorance (13, III). Now we must pay again under an unreasonable law, which did not so much as require that the creditors, who might easily thus have protected us, should have filed in some place or other some sort of a notice to advise us.

A more complete way to entangle shipping and to make vexatious and uncertain a pursuit which, because it is hazardous to begin with, the policy of legislation has been to simplify, would be hard to find than this of Washington. Let us look at the maritime lien statutes of the several states as they are collected, say, in Jones on Liens (vol. 2, secs. 1736 *et seq.*). Where is there one half so burdensome and unfair as this before us now? In every other state qualification or moderation in some respect is observable, but not here. Some of the states extend the lien only to the original construction of ships, others only to certain kinds of supply or material men. The Washington law sweeps in all and makes the contractor an agent. Many of the laws require some public record to afford notice, this of Washington none. Above all things do we observe the general moderation as to time, which in none of the statutes exceeds a year, except in Michigan (and there only a year as to innocent purchasers), and in many instances is limited to days. The known expedition of admiralty is almost universally favored.

Attacked under the commerce clause of the Constitution, this Washington statute will perhaps be defended as a mere measure for the collection of debts, a thing to which the instruments of interstate commerce are obliged to submit. To this we reply that no State shall so frame its laws for the collection of debts as to burden commerce unnecessarily. It was the states themselves that volun-

tarily surrendered (the chief and, at any rate, the original motive to a closer union) the rights over interstate commerce, and even in the collection of debts they must not visibly hamper it. Shall a State say, for instance, that a ship or a railway car, being seized on lien or attachment, shall not by bond, or any other process, be released until after trial, and be subject meanwhile to keepers' fees perhaps for years?

SECOND QUESTION.

This question we deem unnecessary to consider. Mechanics' lien statutes have generally been adjudged valid as to due process of law by the inferior courts of the country, though no decision on that point has ever been ever been rendered here. We are content to pass the subject.

THIRD QUESTION.

Does the Washington statute invade the jurisdiction in admiralty?

That a state may enact lien laws as to ships owned within it has long been settled. Not a line, however, of any decision to that effect can be fairly construed as authorizing also liens on ships owned *without* the state. Indeed, it is questionable whether such liens were intended to be supported, even within the state, beyond the *home port*, but, be this as it may, they are supported on local ships only. Examine any decision in which one of these liens was directly involved and it will be found to go no further, nay, by plain intendment, to forbid more. (*The General Smith*, 4 Wheaton, 438; *Peyroux vs. Howard*, 7 Peters, 324; *The Belfast*, 7 Wall. 624; *The Lottawanna*, 21 Wall. 558; *The J. E. Rumbell*, 148 U. S. 1.)

These cases, in the order we have cited them, fairly record the beginning, the continuation, and the present

status of decisions supporting state lien laws on vessels. Many others can be found, but all had to do only with lien laws *in home ports*. Nor can any fair encouragement be found in them toward extending such liens to *vessels beyond home ports*. The usual language in these opinions is about what we find in *The Lottawanna*, where Justice Bradley said (the italics are ours):

"So long as Congress does not interpose to regulate the subject, the rights of material men furnishing necessaries to a vessel *in her home port* may be regulated in each state by state legislation."

The local lien was there sustained, for the ship belonged to the port of New Orleans, the services and supplies were furnished there, and there the libel was filed. *The J. E. Rumbell* is a recent expression on this subject. *The Rumbell* belonged to Chicago, "the residence of the owner and the home port of the vessel," and it was at Chicago that she was libeled. A decision of this court expressly upholding one of these liens upon vessels of other states is yet to be rendered. Indeed, the very arguments of the courts sustaining these home port laws plainly exclude their being extended to ships of other states. The argument in them is that, as the maritime law allows no lien in a home port, the domestic statute should be allowed to supply one. The converse of this would fairly appear to be that, when the general, or admiralty, system does supply such a lien (that is, on vessels when away from home), the domestic law is neither proper nor necessary. The language of this court in *The Belfast*, 7 Wall. 646, plainly suggests this:

"Such a lien does not arise from a contract for materials and supplies furnished to a vessel in her home port, and in respect to such contracts it is competent for the

states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement."

Moreover, we find excellent authority affirmatively against any such extension. Story in *The Chusan* (2 Story, 455) gave his opinion against it in 1843. He spoke there as a Circuit Justice familiar with the original organization of our government, and yet speaking on this point not merely theoretically, for in 1843 he had before him *The General Smith* (the opinion there by himself) and *Peyroux v. Howard,* in which the Supreme Court had permitted the operation of local liens. To both these decisions he refers. But while he is thus one of the very founders of the right of local lien, he is positive neither of these decisions ever intended to extend it to vessels of other states. Of the New York lien law he says:

"This statute is, as I conceive, perfectly constitutional, as applied to cases of repairs of domestic ships, that is, of ships belonging to the ports of that state. * * * But in cases of foreign ships and supplies furnished to them the jurisdiction of the courts of the United States is governed by the constitution and laws of the United States, and is in no sense governed, controlled or limited by the local legislation. * * * For myself, I can only say that during the whole of my judicial life I have never up to the present hour heard a single doubt breathed upon the subject. The distinction between foreign ships and domestic ships as to this matter of lien was stated with great precision and accuracy by Mr. Justice Thompson in *Peyroux v. Howard,* * * * Language of similar import was used in the case of *The General Smith.* Now, it is impossible to read this language and not perceive that the court never entertained the slightest notion

that the question of lien for repairs and supplies of a foreign ship did depend or could depend upon the local law of a state. It was treated throughout as governed solely by the maritime law. * * Besides, by the constitution of the United States, Congress has the power to regulate commerce with foreign nations and among the several states. The power to regulate commerce includes the power to regulate navigation with foreign powers, and it is an exclusive power in Congress."

The Chusan was cited with approval twelve years later, in *Steamboat New York v. Rae,* 59 U. S., 223, in which a local rule of navigation of New York was held good as to domestic, and bad as to foreign ships; in *Hall v. DeCuir,* 95 U. S. 485, in 1877; in *The Globe* by Justice Nelson (2 Blatch. 427); and in *The Selah* (4 Sawyer, 40).

The Chusan is further approved and followed in *The Lyndhurst,* 48 Fed. 839, where it is decided that the New York lien law can not be made applicable to a New Jersey vessel.

In *The Electron,* 74 Fed. 689, the question was reserved as having been already by that court certified to this in another case not mentioned by name.

Since this appeal has been taken a new work, Hughes on Admiralty, p. 108, reviews the few authorities on this question, approves the opinion of Story, and says:

"As stated above, the distinction between supplies furnished to domestic vessels and to foreign vessels is largely artificial, and it is to be regretted that it was ever made. The symmetry of marine laws requires that the general doctrine be modified as little as possible. If state statutes can regulate not only claims against domestic vessels, but against foreign vessels, they can add liens to maritime causes of action that did not exist before, and

take them away where they did exist. Consequently, a foreign vessel would find a different law in every port. It would certainly seem more consistent with principle to hold, as is historically true, that the sole purpose and object of these state laws were to put domestic vessels on the same footing as foreign vessels. The converse of this, that they can reduce foreign vessels to the basis of domestic vessels, would be a great anomaly. Accordingly, the best considered decisions have held that the maritime rights of foreign vessels are independent of these state statutes (as an attempt to regulate them would be to interfere with the general admiralty jurisdiction), and that these statutes regulate only rights against domestic vessels."

IV.

In conclusion we would say (1) that as applied to vessels of other states, a local lien appears to us to invade the interstate commerce powers of the federal government; (2) that if any such law can be valid, it can not be this, because it is not a reasonable one; (3) that, as regards the admiralty jurisdiction of the federal government, such laws, whether reasonable in terms or not, are void as to vessels of other states, because wholly unnecessary, and in their nature incompatible with the complete system of admiralty and its policy.

On such considerations we trust the decision of the lower court will be reversed and that, having paid the principal contractor already, we shall be relieved from now paying the sub-contractors the whole sum anew.

FREDERICK BAUSMAN,
Counsel for Appellant.